3

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a corporation,
Plaintiff in Error,
vs.
ANNA F. FRESCOLN,
Defendant in Error.

No. 2887

Reply Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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MUTUAL ENGRAVING & PRINTING CO.

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The "Statement" by the Plaintiff in Error is fair and covers the case, as well also, the history of the enactment by the Washington Legislature of the two statutes involved in the suit at bar.

The sole and only question in this case is whether

or not there is a right of two actions under Sections 183 and 194 Rem. & Bal. Code of Washington.

Plaintiff in Error cites many cases, (Plff. in Error's Brief, p. 11), quotes at length and argues earnestly as to who are "heirs or personal representatives." There is no question or dispute as to that point in the case.

On page 15 of the brief many cases are cited to show that "*but one action* can be maintained," with an evident intent to have us believe that they apply to and cover the two statutes, but such is not the case. Each and every case cited simply holds that the beneficiaries under the death act can not split their actions, and do not cover the two statutes or the right of an action under each. When these two questions, neither of which are in this case, are eliminated, but the one question, as to the right of two actions is left.

It is asserted with apparent earnestness that "two recoveries for one wrong" should not be permitted; failing to observe that one negligent act may cause two distinct injuries, as in this case. There is one injury to the estate and another to the dependent representatives, hence a right of action by each. Supposing I should step into my backyard and shoot my next door neighbor and that the bullet should

pass through his body and kill my second door neighbor. Would not each of their representatives have a right of civil action against me for damages?

Yet there would be but one overt or negligent act, but surely two injuries and both should be paid for.

On page 17 it is asked, "can it be the policy of the law that the heirs of the deceased should recover full compensation for the injury received by the deceased, and that in a second action the same heirs be permitted to recover full compensation for the death of the injured party?" That is not a fair question for the heirs are not the same in these two cases. In the survival case every legal heir is a beneficiary of the verdict, while in the *death* action only the defendant relatives are the beneficiaries, and full compensation for the injury has not been recovered.

It is as simple a proposition as the right to two actions on a promisory note payable in installments.

This will be fully brought out by authorities cited later.

Concurrent actions should be allowed because the elements of damage in the two actions are not at all the same although growing out of the same wrong. There is nothing inconsistent in a right of two actions in such cases and under such statutes.

"The fact that two causes of action spring out of the same contract will not ipso facto render a judgment on one a bar to a recovery on the other."

23 Cyc. 443.

"The right of action given to an administrator to sue for his intestate's loss of life for the benefit of the widow and children is independent of the administrator's right to sue for damages suffered by the intestate during his life-time from the injury which caused his death and both actions may proceed at the same time."

Bowes vs. City of Boston, 155 Mass. 344, 15 L. R. A. 365,

13 Cyc. 326.

According to the argument of Plaintiff in Error it seems it would have required us, when the death occurred, to have dismissed the action for damages then pending and not revived it, but rely upon our right under the death act, virtually admitting that the death act abrogates the survival act, which is not true.

The two acts are to be construed together. They were clearly designed to *enlarge,* rather than to diminish, the rights of recovery and are both remedial, and it was not the intention to require an election of remedies.

Neither act is repealed by the other:

Noble vs. City of Seattle, 19 Wash. 138;

Mesher vs. Osborne, 75 Wash. 443;

Swanson vs. Pac. Shipping Co., 60 Wash. 87, 110 Pac. 795.

That no recovery for the death could have been had in the first action is well settled by the Washington Supreme Court, in *Thompson vs. Seattle, Renton & Southern R. Co.,* 71 Wash. 443, 128 Pac. 1070.

"The jury could award nothing for her death, nothing for the losses caused the respondents by reason of her death, and nothing by way of punishment of the appellant because of its negligence," citing:

Swanson vs. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795;

Helland vs. Bridenstine, 55 Wash. 470, 104 Pac. 626.

On the question of the validity of the two sections 183 and 194, the court says in the Swanson case above cited:

"Both sections were originally enacted in one and the same statute. Each was intended to serve its separate purpose, and must be so construed as to secure that result. The trial court committed no error in allowing the substitution of parties plaintiff, in permitting the filing of the supplemental complaint, or in the theory upon which it admitted evidence, instructed the jury and tried the case."

I call special attention to the instructions in the Thompson case, which were approved by the Supreme Court.

While there has been much disagreement by the courts on the question here involved, we believe the great weight of the later authorities especially bear out our contention, and surely the most reasonable, just and logical arguments sustain our contention.

We will be content with citing a number of cases and quoting from a few, which conclusively show that in this case there should be

TWO ACTIONS ALLOWED.

Hedrick vs. Ilwaco R. & Nav. Co., 4 Wash. 400, 30 Pac. 714;

Swanson vs. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795;

Thompson vs. Seattle, Renton & S. R. Co., 71 Wash. 436, 128 Pac. 1070;

Walters vs. Chicago R. I. & P. R. Co., 36 Ia. 458;

Bradley vs. Andrews, 51 Vt. 525;

Hurst vs. Detroit City R. Co., 84 Mich. 539, 48 N. W. 44;

Bowes vs. City of Boston, 155 Mass. 344, 15 L. R. A. 365;

Westcot vs. Central Vt. R. Co., 61 Vt. 440, 17 At. 745;

Belding vs. Black Hills & Ft. P. R. Co., 3 S. D. 369, 53 N. W. 750;

Brown vs. Chicago & N. W. Ry. Co., 102 Wis. 137, 77 N. W. 748 and 78 N. W. 771;

Missouri P. R. Co. vs. Bennett (Kas. App.), 47 Pac. 183;

Brodie et al. vs. Wash. Water Power Co., 92 Wash. 574, 159 Pac. 791;

Lehmann vs. Farwell, 95 Wis. 185, 70 N. W. 170;

In the Hedrick case the court says:

"Two actions may thus spring from the same wrongful act, because two distinct injuries are thereby inflicted. But the actions are prosecuted in different rights and the damages are given upon different principles."

In *Hurst vs. Detroit City R. Co.,* it is held that a recovery in one action is no bar to recovery in the other action.

In the Belding case speaking of the survival act the court says:

"The only damages recoverable under the section are such as the estate has sustained but not for the loss of the life of the deceased."

In *Brown vs. Chicago & N. W. Ry. Co.,* 78 N. W. 771, on the motion for rehearing:

"Where a statute to be construed is too plain to admit of any other construction than that which the ordinary meaning of words suggest, the maxim 'Noscitur a Siciis' can not be adopted."

I am somewhat surprised at the temerity of the

writer of Plaintiff in Error's brief in citing and quoting at such length (pp. 24 to 29) from the case of *Brodie vs. Washington Water Power Co.* 92 Wash. 574, 159 Pac. 791, evidently for the purpose of showing that where the plaintiff before his death had made a full settlement for his injuiries, his dependent relatives could not maintain an action under the death act. *That question is not in the case at bar at all.* The writer of the brief in that self same Brodie case seems to have overlooked the fact that the court said:

"The statutes were enacted to overcome defects thought to exist in the common law. * * * The first section of the statute cited is plainly a survival statute. Its purpose is to preserve in the beneficiaries named therein such right of action as the injured person himself had because of the wrongful or negligent act causing the injury, and is confined to such personal loss as the injured person sustained. The second, although originating in the same wrongful act or neglect, begins where the other ends and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured," citing both the Swanson and Thompson cases heretofore herein cited. This case seems to practically refute the assertion (Plff. in Error's brief, 13), that the state court has never squarely decided this point.

On page 20 of Plaintiff in Error's Brief they illustrate with an extreme case, by taking off both

arms and both legs of the victim. Why not carry it to a full extreme and put out his two eyes and destroy his hearing? In these days of advanced scientific appliances, with only both arms and both legs gone, my man who happened to be a minister of the Gospel could very soon have been rigged out with artificial limbs, and on that account advertise as an armless and legless preacher, and might have been more successful as such, and his life still valuable. We consider both illustrations rather weak.

Why not make an extreme case of the one at bar? Suppose Mr. Frescoln had possessed a small estate at the time of his death and had debts amounting to $2,500, and had left a wife and three minor children and a stranger had been appointed by the Court as administrator of the estate. Would it have been proper for said administrator to step in and dismiss the action pending and tell the family that they could be fully compensated by bringing a suit under the death act? What would the creditors of the estate say to this administrator? Surely that right of action is an asset of the estate and as all the verdict obtained would have been consumed in the payment of the debts, the wife and minor children would not have had a cent for the injury suffered by them.

At page 24 of Plaintiff in Error's Brief, much is attempted to be made of the fact that in the action brought by deceased, he only sued for damages in the sum of $5,323, while in the supplemental complaint afterwards filed, damage was asked in the sum of $20,613. It should be remembered that in the first action the party was still living and no doubt, little realized the extent of his injury. He was injured on the 22nd day of November, 1913; he brought his suit on the 22nd day of January, 1914; he died on the 15th day of September, 1914. The damage, therefore, had been very much augmented between the time of the bringing the suit and the time of his death, and we are sure this Court recognizes the custom of naming large sums in such class of cases.

In *Mahoning Valley R. Co. vs. Van Alstine,* 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. 893 the Court said:

"It is manifest from the foregoing that the revived action and the later action are not the same. They rest primarily upon the same alleged negligence of the defendant and the same absence of contributory negligence of the injured person; but in the revived action, the damages are for personal injuries to the injured person for which an action would lie if death had not ensued, and such damages to insure when recovered to the benefit of the estate, while in the later action the suit is prosecuted in the

interest of other parties, and the measure of damages is the pecuniary loss they have sustained by the death. In the later case death gives the right of action under the statute, while, had the pending action not been susceptible of being revived, the death would have terminated the right to recover in the interest of the estate."

Plaintiff in Error has cited the Michigan cases, for which we are very much pleased and it quotes at length from Justice Long's opinion in the Sweetland case. I consider that the arguments by the members of that Court to be about the most exhaustive and clear of any that I have been able to find, but I submit that the dissenting opinions of Chief Justic Montgomery and Justice Hooker in the Sweetland case are by far the better arguments on the question.

In the case of *Dolson vs. Railroad Co.,* 128 Mich. 444, 87, N. W. at page 633, Justice Moore says, "The question involved here was discussed in the case of *Sweetland vs. Ry. Co.,* 117 Mich. 329. Justice Montgomery was of the opinion a recovery could be had under both acts; Justice Hooker was of the opinion recovery could be had under the survival act and not under the death act; Justices Long and Grant were of the opinion recovery could be had only under the death act; while I was of the opinion there was no evidence to show the deceased endured pain and suffering after her injury and therefore, under the record as made, there could be no recovery and it was not necessary to pass upon the other question. The result of the discussion in that case is that three

of the judges held that there could be a recovery under the death act, two of the judges held there could be a recovery under the survival act, one of the judges held there could be a recovery under both acts, and one expressed no opinion as to whether recovery could be had under either or both acts; so it cannot be said the question is concluded in this Court."

And a few excerpts from the same opinion, several quoted by Justice Moore from an article in 28 Am. Law Reg. (N. S.) 385, 513 and 577, "We consider (1) that the purpose of this action is to compensate certain persons for indirect injuries to them involved in causing the death of another * * * and (3) that the damages given in the action entirely exclude such as the deceased himself could have recovered,—we find it impossible to reach any other conclusion * * *. The simple answer to this question is that the two actions are brought for different consequences of the same act and are certainly as distinct from each other as is the action brought by a husband or a father for an injury to his wife or child from the personal action of the wife or child for the same injury * * *. If this is the correct view, it will sometimes happen that two actions will be maintainable after death, one representing the injured person's cause of action, the other the family's cause of action."

And speaking of inconsistency of the two acts, which is urged by some authorities, he goes on to say, "There is seeming force in this objection, but the charge of inconsistency ought to be laid at the door of the legislature which enacts the statutes * * *. The language of the statutes when viewed in the light of the evi-

dent legislative purpose is too plain to justify courts in interpolating in them language not there by necessary implication from the context * * *. It takes the wrongful act and the loss to make a complete cause of action and, as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct * * *. Such damages to the widow and next of kin begin where the damage of the intestate ended, viz. with his death."

A few quotations from Justice Montgomery in the Sweetland case, "The remedies afforded are, however, quite distinct and different. Under Sec. 7397 it is clear that no recovery could be had by the executor because of the fact of the death of his testator, but he could recover from such injury as his testator sustained in his lifetime, notwithstanding his death, while under the Act of 1848 the recovery is limited to the pecuniary loss resulting from such death, to the person who may be entitled to such damages when recovered. It is clear, therefore, that the act of 1848 does not cover the whole ground, as, if the case be such that the widow or next of kin is unable to show pecuniary loss resulting from the death, no recovery can be had, notwithstanding the deceased may have been entitled to substantial damages if he had taken action in his lfetime, and notwithstanding the express provision of Sec. 7397 that his cause of action shall survive * * * thus leaving the right conferred under Lord Campbell's act dependent on the question whether the executor shall be more concerned for the creditors than the beneficiaries named in the act—a view which we regard as totally untenable."

And a few quotation from Justice Hooker in the

same case, "If we are to sustain the contention that the death act is exclusive, it must be held that it repeals by implication so much of the survival act as before the enactment of the death act applied to and supported actions by representatives for rights of action which accrued to persons injured through assaults and batteries * * *. This means that there can be no survival of an action in the case where death ultimately results from the wrong. It would be lost by death, not only where there are representatives to suffer by the death, and who may therefore recover for their pecuniary injury, but also where there is no pecuniary injury to anyone through death, in which case all right of action would be lost; this rule would go so far as to put an end to pending suits, at whatever their stage before the verdict, and notwithstanding the fact that large sums had been expended which would be lost to the estate."

But the Supreme Court of Michigan has settled the question in that state of "two rights of action," by a unanimous opinion rendered July 15,1909. In the case of *Fournier vs. Detroit United Ry.,* 122 N. W. 299.

"A declaration, alleging damages sustained through an injury resulting from defendant's negligence, cannot be so amended, after plaintiff's death in the revival of the action in the name of the administrator, as to authorize a recovery of damages for wrongful death, authorized by Pub. Acts 1905, p. 120, No. 89; the amendment being a new and different cause of action." And citations therein made.

In *Hurlbut vs. City of Topeka,* 34 Fed. 510, Justice Brewer quotes approvingly and at length

from *Needham vs. Railroad Co.,* 38 Vt. 294, and also from *Blake vs. Railroad Co.,* 10 Eng. Law. & Eq. 443, and these he follows with an argument which seems to me to be unanswerable. "It is obvious that both these causes of action may exist against two different parties, and why may they not exist against the same party? Suppose A commits an assault and battery upon B. A cause of action exists in favor of B against A, for those injuries which survived by Sec. 420 (Referring to the Kan. Statute). Suppose, after an action is instituted by B, he should be killed by the wrongful act of C. There certainly would be an action under Sec. 422 against C for such wrongful death. Would that defeat the first action or would not that survive as provided under Sec. 420? If that be true where there are two wrong doers why should it not also be true where there is but one wrong-doer? * * * as I said before this Court is bound to administer the laws of the state as interpreted by her Supreme Court."

The Kansas Court in its early cases was wrong but the foregoing seems to have persuaded it to get right on the question. In *Missouri P. R. Co. vs. Bennett* (Kans. App.), 47 Pac. 183, which was an action to invoke the appointment of an executor so as to prevent him from prosecuting a suit brought by the injured party it was held that twe causes of action are given by Kan. Civ. Code., Sec. 420, providing that action for injury to the person shall survive and Sec. 422, providing that the personal representatives may recover for the death if the

injured party might have recovered if he had lived, and the damages must inure to the widow and children. Under the first action the right of action survives for the benefit of the estate, and under the second a new right of action is created for the sole benefit of the widow, children or next of kin, (Disapproving *McCarthy vs. Chicago R. I. & P. R. Co.,* 18 Kas. 46, 26 Am. Rep. 742).

But we fail to see why we should seek any further outside authorities and continue quoting opinions, when the question here involved has been clearly and forcibly settled by this Court, for it has said in *Northern Pac. Ry. Co. vs. Adams, et al.,* 116 Fed. 324, "The statutes have been variously held to be penal and remedial, and accordingly given strict and liberal constructions. But under the most liberal interpretations implied provisions cannot be introduced into a statute where no ambiguity appears. The intention of the lawmakers is to be determined by the words they employ; and, where statutes have been enacted by certain states omitting provisions which occurred in similar statutes in other states, courts have no right to presume that such omission was negligent or unintentional, especially where the language is clear and conclusive without such clauses. In such cases there is nothing to construe.

Language bearing a plain import needs no extended construction. In the statutes of both Idaho and Washington the clause limiting the right of action to circumstances which would have permitted the deceased to sue is entirely omitted, and nothing appears elsewhere to warrant its insertion by implication. The omission must therefore be considered as unintentional and the legislative will to be completely expressed without such limiting provision. The right of action given by such statutes is to the heirs or personal representatives of a person killed by the wrongful act of another, not for the injuries or damages caused to the deceased but for the injuries and damages caused to his heirs or representatives by reason of the loss of the deceased. It cannot be dependent upon the right of the deceased to such an action if living, for it does not come into existence until his death by the wrongful act of another. It then springs into existence by virtue of the statute, in the heirs or personal representatives, purely and simply because they have been damaged by the wrongful or negligent act of another, the relationship existing between the deceased and the party causing the death having no bearing upon the right of action other than as a circumstance to be considered in determining the degree of negligence. In the case of *Munroe vs.*

Reclamation Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, the Supreme Court of California in construing a similar statute to those in controversy herein, held the act given for a death caused by negligence to be a new action and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury. The Supreme Court of the United States in the case of *Railroad Co. vs. Dixon,* 179 U. S. 131, 135, 21 Sup. Ct. 67, takes the same view. A statute of the State of Kentucky was there under consideration which contained no words of limitations of the right of action given for the death of a person by negligence or wrongful act. The Court said: 'The cause of action thus created is independent of any right of action the deceased may have had or would have had if he had survived the injury.''

Under the statute of both Idaho and Washington, then, the plaintiffs had a right of action against the defendant Railroad Company for the just damages to them resulting from the death of the said Jay H. Adams if his death was caused by the negligence of the Railroad Company; and this right of action was in no way dependent upon any right existing in the deceased before his death, or which might have accrued to him hed he survived.''

In th case of *Railroad Co. vs. Dixon, supra,* Chief Justice Fuller said: "The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury:" and in *Munro vs. Reclamation Co., supra,* it is said: "The act * * * gives to the representatives a totally new right of action on different principles."

For the reason that the question raised in this case has been heretofore so clearly settled in this jurisdiction, 1st by our State Supreme Court, 2nd by Judge Neterer in his holdings and rulings in the lower court, and 3rd by the opinion of this court in the case last quoted, we believe it is plainly manifest that the writ of error was sued out in this case for the sole purpose for delay, and comes under Section two of Rule 30. We therefore ask that damages in the sum of ten per cent in addition to the interest be awarded the Defendant upon the amount of judgment.

We forego any extended CONCLUSION—there can be but one—further than to enter a general denial to those of the Plaintiff in Error, and to say that the contrary is true of each and every one, excepting number four.

For the reasons urged we respectfully submit that the judgment of the lower court should be affirmed.

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